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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 9

HOWARD LAWN,

Petitioner,

—vs.—

UNITED STATES OF AMERICA,

Respondent.

REPLY TO GOVERNMENT'S MEMORANDUM ON PETITIONER'S MOTION TO STRIKE.

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The memorandum submitted by the Government in response to petitioner's motion to strike (hereinafter "Response") rests, we believe, on misapprehensions of law and misreading of the record. The Government again has submitted material *dehors* the record certified to this Court.

The basic error in the Government's position is its contention that the issue concerning Exhibits 61A and 61B was first raised by petitioner in the Court of Appeals (pp. 1-2, Response). To the contrary, the issue of illegality of these papers for all use in this prosecution was raised by petitioner and adjudicated in his favor, in advance of the trial, by Judge Goddard in 1953.

Petitioner raised his constitutional objection to the papers used on trial as Exhibits 61A-B, in the District Court (R. 2866-71), in the manner *approved* in *Cogen* v. *U. S.*, 278 U. S. 221 (1929), and in the manner *required* by other federal courts. *Waldron* v. *U. S.*, 219 F. 2d 37 (D. C. Cir. 1955); *U. S.* v. *Wheeler*, 149 F. Supp. 445 (W. D. Pa. 1957).

These cases teach that a defendant should (and probably must) move seasonably before the trial to raise his constitutional objections to evidence improperly obtained and that the decision on such an objection determines the issue for the trial. Petitioner raised such an issue before trial. Judge Goddard then ruled that Exhibits 61A and B (then Grand Jury Exhibits 2, 4) had been unlawfully obtained by the Government, and outlawed and ordered them returned to the petitioner (R. 2871).

The Government would have this Court excuse the "inadvertent mistake" in using outlawed evidence, which is "inconsistent with the affidavits" denying such use "submitted by the prosecutor" (Br. No. 9, p. 46), by arguing that Exhibits 61A and B were papers of a partnership of which Lawn was not a member and consequently that Lawn, although in possession thereof, had no privilege with respect thereto (pp. 12-13, Response).* This does not suffice as an answer for the "inadvertent mistake" in using tainted evidence. Judge Goddard held that Lawn had a privilege which was violated. The correctness of Judge Goddard's order may not now be litigated collaterally, as the Government concedes. Accordingly, since the papers were ordered to be returned to the defendants, they were not available against any defendant, including Lawn. *McDonald* v. *U. S.*, 335 U. S. 451 (1948).

The foundation of petitioner's claim relating to Exhibits 61A and B is that he was compelled to produce the originals

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* The cases cited by the Government are completely wide of the mark. *Grant* and *Wheeler* simply hold that where the principal has no privilege the agent who has the papers in his custody has no privilege. Conversely it would seem that where, as here, the principal has a privilege, so has the agent. Lawn was a principal, certainly with respect to his endorsement which was the most significant part of the Exhibits. *White* simply holds that an officer of a labor union has no personal privilege as to the union's papers. In order to invoke the privilege the person need only hold the papers in a personal capacity, as did Lawn here. *U. S.* v. *White*, 322 U. S. 694, 699 (1944).

thereof before the Grand Jury and that the copies, Exhibits 61A and B, were made by the Grand Jury from these originals subpoenaed by the Grand Jury (p. 4, Response).

These are record facts.

The record facts.

Lawn and his papers were subpoenaed before the Grand Jury on July 15, 1952 (R. 2798). Lawn was thereby compelled to appear and did produce four papers which were marked Grand Jury Exhibits 1 to 4, of that date (R. 2802).

The four papers consisted of three checks endorsed by Howard Lawn and drawn by Tavern Fruit Juice and dated respectively November 7, 1945, February 3, 1946, March 11, 1946, and a check stub that related to the first check (R. 2798).

Trial Exhibits 61A and 61B (facing R. 2999 and R. 3001) bear the following marks respectively: "G. J. Exhibit 2 7/15/52" and "G. J. Exhibit 4 7/15/52" (R. 2998-9).

Trial Exhibit 61A is the copy taken by the Grand Jury of the check described as Grand Jury Exhibit 2 and bears both the Grand Jury and the Trial Exhibits markings. Trial Exhibit 61B is the copy taken by the Grand Jury of the related check stub described as Grand Jury Exhibit 4 and bears both the Grand Jury and the Trial markings.

Additional errors of Government Response.

The Government lists six further statements which it erroneously says are improperly relied on by petitioner because they are not in the record (pp. 3-5, Response). Seriatim, these six erroneous statements of the Government are:

1. The Government says that the petitioner supplies the information *dehors* the record that the pink date stamp was not seen by defense counsel at the trial (p. 3, item 1, Response). It is true that petitioner's present counsel claims to have been the first to discover the illegal use and that he

made this discovery by means of finding the pink stamp inside the folds of the exhibits. We believe that it is reasonable to draw the inference of such first discovery and so to argue because, this accepts at face value the repeated and solemnly given and sworn assurances of the trial prosecutor of his certainty that no suppressed documents were used on the trial in any way. The alternative would have been for counsel to charge a knowing and wilful violation of petitioner's rights, wilful disobedience of two Court orders and false swearing. We believe that it was a further reasonable assumption to be drawn from the record, that present counsel, was the first to discover the "inadvertent mistake' implying thereby that defense trial counsel failed to perceive the pink stamp inside the folds of the exhibits, one of which had its sides actually stapled together. To reach this inference the petitioner relies on the record proof that throughout the trial the defense trial counsel was demanding a hearing so that he could ascertain what tainted evidence had been used either directly or as leads and clues. And there is not a shred of record evidence to suggest that the defense trial counsel intentionally proceeded to relinquish a known right. What petitioner does say in this connection is that the two exhibits were folded or stapled so that there was no warning on the face of them that there was a teil-tale pink stamp on the ostensibly blank inner sides thereof; the pink stamp was not physically visible but was concealed within the folds. This argument of petitioner is demonstrated by the record evidence, the exhibits themselves.

2. The Government says that the petitioner supplies *dehors* the record the claim that this pink stamp did not appear on exhibits legally obtained by the Government (p. 3, item 2, Response). The petitioner's claim appears within and is proved by the record as to these and every exhibit *used on the trial*. Examination by this Court of the exhibits used on the trial and certified to this Court will disclose that there is no pink stamp on any of them. Whether other Grand Jury exhibits, not used on the trial, were so stamped (pp. 3-4, item 2, Response) is not only immaterial but itself rests on present assertions of the Government *dehors* the record.

3. The Government admits that the originals of Grand Jury Exhibits 2 and 4 certified to this Court are the ones produced by Lawn before the 1952 Grand Jury, but the Government says that this supplies a fact not of record (p. 4, items 3 and 4, Response). However, the Government has overlooked the fact that these originals are of record in this case. They were part of the Grand Jury proceedings which Judge Goddard reviewed and these proceedings are part of the record before this Court. The record on appeal from Judge Goddard's order was certified to this Court and discloses that "all necessary exhibits are included in the record" on the Government's appeal therefrom (R. 2877).

4. The Government asserts that the *factual* premises supplied by petitioner *dehors* the record, include the premises that the papers were obtained in violation of Lawn's privilege or that Lawn had not waived his privilege (p. 4, item 5, Response). These are not merely premises of fact; they are matters of law decided by Judge Goddard. Both matters were decided in Lawn's favor by Judge Goddard. Judge Goddard specifically held that these very papers were obtained in violation of Lawn's privilege. Implicit in that holding is the necessary holding of law that there had been no waiver by Lawn prior to the date of Judge Goddard's order. And, this is not the time for the Government to argue that the Judge's ruling was a mistake.

5. The Government says that there is no record support for petitioner's statement that two judges ordered Exhibits 61A and 61B returned to Lawn since, it says, the return orders applied only to originals, not copies (p. 5, item 6, Response). The record shows that Judge Goddard specifically ordered that whatever was produced by the defendants to the Grand Jury was to be returned to them except for corporate papers. And Judge Palmieri's order is as broad as Judge Goddard's order. The law is that copies made from tainted originals are also tainted. *Silverthorne Lumber Co. v. U. S.*, 251 U. S. 385 (1920).

6. The other matters allegedly supplied by petitioner *dehors* the record are references in petitioner's brief to matters in the petition for rehearing in the Court below (pp. 5-6, item 7, Response).

Preliminarily, none of the facts set forth in that petition for rehearing are necessary to establish here the unconstitutional use of tainted evidence. We assumed that since the certified record (as required by Rule 36) does contain the petition for rehearing (the facts of which were not controverted below by any affidavit on the Government's part) the matter in this petition is available for use as record matter. If such an assumption is an error and the facts in a petition for rehearing in the Court below are not part of the certified record which may be referred to in this Court, the claims of unconstitutional use nonetheless remain with solid support in the record made in the District Court.

The Government finally argues:

> "* * * any remand should not be for a new trial but to the district court to enable petitioner to file a motion for a new trial and to have a hearing on that motion at which time petitioner could seek to establish his privilege with respect to the check and, study the non availability of other copies, no prior waiver, etc." (p. 11, n. 4, Response.)

This argument overlooks the fact that the errors complained of and asserted by this appeal are errors of record. The Government's proposed procedure would apply only to situations of newly-discovered evidence which are not matter of record. Furthermore, the suggestion that it is incumbent on petitioner to prove "the non availability of other copies, no prior waiver, etc." (p. 11, n. 4, Response) shifts from the Government its burden of proof of such contentions.

Nardone v. *U. S.*, 308 U. S. 338 (1939), spells the rule to be applied. When tainted proof has been used, advertently or inadvertently, the remedy to be administered is a new

trial, preceded by a hearing in which the Government is required to prove that the evidence it seeks to use on the trial is untainted. See *Nardone* v. *U. S.*, 127 F. 2d 521 (2 Cir. 1942).

Respectfully submitted,

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